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Trade and Transport Programme Development Area

Recommendation 14

Public and Private Partnership in Trade Facilitation

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PPP-TF RECOMMENDATION

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1. INTRODUCTION

This Recommendation has the aim to provide a better understanding of Public and Private Partnership (PPP) in Trade Facilitation (TF). Increasingly, governments are turning to the private sector for the financing, design, construction and operation of infrastructure projects, but there are new types and new approaches of PPPs.

It is important to highlight in this Recommendation, as an exercise of impartiality of the UN/CEFACT, that PPP is just one among other many possibilities to provide a service by the collaboration of the public and the private sector. However, the use of this kind of agreements

justifies the effort of this Recommendation to contribute to the right and proper implementation of PPPs providing the conceptual framework and the concrete scope of applicability in trade facilitation, sharing knowledge and building the capacity to plan, execute and monitor a PPP project in TF, and showing case studies as best practices and pitfalls.

1.1. DEFINITIONS OF OF PUBLIC AND PRIVATE PARTNERSHIP (PPP)

International organizations and the literature shows different definitions of the term Public and Private Partnership (PPP). There is not a consensus in terminology, scope and contents all over the world about PPP, and the legal frameworks, if any, varies enormously from country to country. Additionally, there is a wide variety of types of business models in PPP which add difficulties to identify them. A main issue in this Recommendation in PPP in Trade Facilitation is to ensure that the scope of this text is clear and well defined. The definition suggested in this Recommendation merges the definition of PPP issued in the “Guidebook on Promoting Good Governance in Public-Private Partnerships” (UNECE, 2008) and the definition of TF provided by the former TBG15 Chair, Gordon Cragge. Thus, Public-Private Partnerships (PPPs) in TF aim at financing, designing, implementing and operating public sector facilities and services through the simplification, standardisation and harmonisation of procedures and associated information flows required to move goods from seller to buyer and to make payment.

There are three main characteristics in any PPP project:

- a) Long-term service provision (sometimes up to 30 years);
- b) The transfer of risks to the private sector; and
- c) Different forms of long-term contracts drawn up between legal entities and public authorities.

By providing a service under a PPP contract in TF, some advantages arise:

- a) Improves the project selection. PPPs bring stakeholders to design, implement and improve TF reforms in infrastructures, ICT, border management, corridors ... adding knowledge, operational experience, efficient business process and management, and financing projects.
- b) Accelerates the infrastructure and services provision. PPPs bring stakeholders to coordinate, harmonize and standardize processes in international trade in a context of an

organized free market to compete among private and public companies that could even attract foreign investments.

- c) It brings stakeholders to simplify procedures, which reduces costs in international trade. This cost reduction could come direct or indirectly by reducing administrative procedures, reducing the clearance time, increasing transparency and reducing corruption, and accelerate economic development and revenue opportunities.

Although the types of PPPs vary, two broad categories of PPPs can be identified: 1) the institutionalized kind that refers to all forms of joint ventures between public and private stakeholders; 2) and contractual PPPs.

The Canadian Council for Public-Private Partnership has described the following PPPs agreements:

- 1.- Finance Only: A private entity, usually a financial services company, funds a project directly or uses various mechanisms such as a long-term lease or bond issue.
- 2.- Operation & Maintenance Contract (O & M): A private operator, under contract, operates a publicly-owned asset for a specified term. Ownership of the asset remains with the public entity.
- 3.- Build-Finance: The private sector constructs an asset and finances the capital cost only during the construction period.
- 4.- Design-Build-Finance-Maintain (DBFM): The private sector designs, builds and finances an asset and provides hard facility management (hard fm) or maintenance services under a long-term agreement.
- 5.- Design-Build-Finance-Maintain-Operate (DBFMO): The private sector designs, builds and finances an asset, provides hard and/or soft facility management services as well as operations under a long-term agreement.
- 6.- Build-Own-Operate (BOO): The private sector finances, builds, owns and operates a facility or service in perpetuity. The public constraints are stated in the original agreement and through on-going regulatory authority.
- 7.- Concession: A private sector concessionaire undertakes investments and operates the facility for a fixed period of time after which the ownership reverts back to the public sector.

In a PPP in TF, the public and private sector should do what it does best. Thus, government should play its role in planning and facilitate trade, policy, and regulation. In turn, private

sector should invest capital; manage human resources and the businesses efficiently; conquer the market with quality services.

- 2 GENERAL HEALTH WARNING ON SUITABILITY OF PPP FOR TF
- 2.01 BARRIERS TO TRADE
- 2.02 GENERATION OF SUPER PROFITS
- 2.03 PUBLIC SECTOR PERCEPTIONS AND CONCERNS
- 2.04 COST TO THE PUBLIC AND THE PUBLIC PURSE
- 2.05 RISK OF PPP MODEL

2.- GENERAL HEALTH WARNING ON SUITABILITY OF PPP FOR TF

To decide on the delivery mode, governments and private sector should conduct a value-for-money analysis that determines whether delivery as a PPP or traditional procurement/financing is the cheaper option on a whole-life-cycle cost basis. The value-for-money consist of the evaluation the cost and the benefits of the project. This process has to be unbiased and thus should be based on high-quality data and a clearly specified and standardized evaluation process. The value-for-money appears in PPP if the net positive gain is greater than any alternative way to provide the service.

The value-for-money quantitative assessment in a PPP project has to include the costs of the investments, operations, upgrading and maintenance, but also, the financing costs, and the transaction and contract oversight costs. Additionally to the costs, the value-for-money assessment includes the benefits of providing a PPP project, such as, the improvements in the service delivery and the predictable changes in end-user requirements.

Note: add the benefits of PPP in TF

7.- Good Governance

The effectiveness of PPP in TF has suffered from the lack of adequate regulatory structures to control both technical and economic performance of each project. Regulation of both qualitative and quantitative factors to evaluate a project is undeveloped. Also, the mechanisms of supervision, monitoring and control are not created or not adapted to neither to PPP projects and PPP in TF projects.

Any PPP in TF should follow the following principles:

- 1) Increase the predictability. Any unexpected procedure, quota or certificate; any substantial change in the tariff rate applied; any unpredictable aspect, rule, regulation, taxes or laws are all just some examples of non-transparent practices that mean restrictions for trading abroad.
- 2) Simplify procedures. Examples of simplification within transparency can include: minimizing the number of documents required to trade; increasing the speed and flexibility of getting import permissions; easing the requirements for compliance to trade abroad; and harmonizing procedures along the trade chain from producers to end clients and through any service providers.
- 3) Increase transparency among the partners and any stakeholders.
- 4) Accountability in the context of international trade is about the capacity to execute the right to make the different entities responsible; the capacity to agree warranties in contracts.

In this context public consultation is one of the key tools employed to improve transparency, efficiency and effectiveness especially but not only, related to regulation (see Recommendation of Best Practices in Trade and Government Consultation on Trade Facilitation Matters, UN/CEFACT 2014).

Transparency and accountability are the best tools to ensure lack of corruption. One of the characteristics of transparency is the access to the information. In a PPP project in TF not only the partners of the project should access to the information: information should be accessible for any stakeholders. In an environment fully transparent, all the information about the project should be accessible and explained in an understandable way.

The aim of this Recommendation is to provide a guideline to apply PPP in TF successfully, reducing disputes and corruption. For this reason, it is important to create mechanisms to reduce the asymmetry of information among partners. Disclosure of information has to follow a pattern of normality or being in regular basis, in which information is accessible without specific active request.

Partners in a PPP project in TF should be fully informed about:

- a) the range of services included in the contract;

- b) the level of execution/performance of the project in regular basis;
- c) the revenues, benefits and performance levels agreed and achieved;
- d) the use of government grants, guarantees and other financial support including significant risk-bearing;
- e) the stream of payments and costs of the project
- f) any changes made since the contract was originally signed and side agreements including government guarantees
- g) the creation of mechanisms to reduce corruption, or inefficiencies (IT solutions, supervision agency, verification systems,...)
- h) future stream of payments and government commitments under PPP contracts;
- i) risks allocation and accountability system to protect the aim of the project against individual interests.

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- 4 Country Diagnostic. Business/economic/legal/institutional environment
Guillaume LAURENCY (CASE STUDY)

- 5 Business Cases. Case models. Feasibility study (independent). Procurement Process
Gordon CRAGGE & Norman ROSE
- 6. Infrastructure other than ICT
 - 1. Design Build Transfer and Operate (DBTO) or similar.
 - 2. Typically longer term contracts of up to 20, 25 or 30 years.
 - 3. These include buildings, road ways and dry ports. Service provider may require third party financing. Roadways and bridge projects could be even longer
 - 4. As with all PPP projects fees are earned by the service provider during the operation phase of the projects
 - 5. Fees earned during service phase of contract NOT during the construction phase.

- 6.02 – Barriers to Trade
 - 1. Need to align cross border applicable legislation
 - 2. Need to align existing systems and processes which may be incompatible with existing systems and processes
 - 3. Any Service provider should be seeking to minimise processing time
 - 4. If possible, along a trade corridor repeat processes should be eliminated.

- 6.05 – Best practice model

1. The generic format would be DBTO,
 - a. Design (By Private Sector)
 - b. Build (By private sector)
 - c. Transfer (assets back to public sector) and
 - d. Operate (by private sector)
2. **Design** The design captures the innovation of private sector and allows exploration of potential solutions that may not have been considered.
3. It could be that the design is a joint exercise between the public authorities and the private sector, or a separate competition. If the latter then there needs to be some sharing of risk between the design team and the service provider
4. **Build** The build and associated risk remains with the private sector – there is an assumption that the private sector can best manage the risks associated with the build phase leading to a project delivered to time and cost.
5. **Transfer** Following successful completion of the construction phase the ownership of the underlying assets should be transferred to a suitable public sector authority or authorities, if such an authority does not exist then ownership of the assets should remain with the service provider until such time as such an “Authority” is set up. It is important that the asset is owned by the public sector in the event that the PPP is cancelled or the service provider fails the assets are already within the control of the public sector.
6. **Operate** The operation of the service should remain with the service provider for the duration of the contract (subject to performance and contract terms).
7. **Risk Register** A joint risk schedule should form part of the contract that clearly identifies the ownership of risks . At the lowest level no risks should be “shared” thereby giving clarity as to who is responsible for mitigating and managing risks
8. **Contract Term** assume the operating contract coincides broadly with the life expectancy of the asset
9. The Public Sector should retain the right to cancel the contract as a consequence of inadequate or non-performance. If the asset is still with the service provider a transfer clause is required for the Government to recover the asset.

6.06 – Unitary Charge (example of topics that could be included)

1. In order to minimise the barriers to trade the supplier should be paid according to a robust payment model.
2. The service provider should be paid according to performance and availability of service.
3. There should be no direct association between the level of charges at the border posts dry ports etc, and the receipt of income by the service provider.
4. Rather the number of units charge and the accuracy of that charging should be the clear indicators used to pay the service provider against an agreed initial payment schedule.
5. Any bonuses must be limited in scope and financed from the use of best practice operations rather than through perceived harassment or the slowing down of traffic creating a trade barrier.
6. With direct charging the income collection by the service provider is vulnerable to
 - a. alternative routes that enable their service points to be bypassed.
 - b. National and international infrastructure and trade facilitation policies
7. The performance mechanism associated with the unitary charge should take into account any such policies that affect the usage and payment of dues by users on the service provider.
8. The unitary charge may comprise budgetary sourcing from more than one national entity. In such circumstances it may be case that direct charging is less risky for the service provider

6.07 – Performance Models (some examples that could be used as a performance model)

1. On the assumption that users are not directly charged and an availability of asset seems easiest solution.
 - a. Roads can be done on number of lanes availability or average time travelled between two points
 - b. Ports on number of docking spaces available, or turnaround times.
2. More analysis is probably required on specific projects to understand the benefits of one approach over another.
3. Government sets a KPI (for the operator / service provider)
4. Service model (how should the Service Provider respond to customers)
5. Monitoring and evaluation mechanism

6.08 – Affordability

1. To be determined by national (or regional or supra-national) budget.
2. Before the project commences the Public Authority needs to secure the revenue funding required to support the operational phase of the project.
3. In some cases the charges will be levied on members of the public but there may be a need to subsidise the operation.
4. This will normally be planned as any direct charges will be regulated and are unlikely to cover the full cost of the operation.
5. It may be that resources may be pledged rather than awarded. (example of a trade corridor concerning multiple countries)

6. As part of the affordability analysis any such resources should be clearly identified, as the sponsor/donor may withdraw their support and render the project unaffordable.
7. If money is not available, such a scheme would have to be self-financing. But if cost of use becomes a barrier to trade, should not be a PPP.

6.09 – Economic Assessment (Value for Money – VFM / economic assessment / environmental)

1. A number of options should be evaluated to determine the option that provides the best value for money.
2. This should include an economic impact study (not just impact of the facility itself, but also the impact on the economy itself [the local area, for example])
3. This is undertaken using discounted cash flows and by calculating an equivalent annual charge.
4. VFM not always the affordable option. Particularly if you think about adding in transfer of asset costs into the contract
5. Estimation of maintenance / service updating costs for delivering the product (especially important for longer-term project) – i.e. the whole life cost (build, maintenance, renewal)
6. Environmental impact

6.10 – Contract Length

Long enough for the asset to generate suitable income for the private sector and allow secondary investments – thus making it an attractive investment prospect.

Keeping in mind that it should not become a barrier to trade.

Overall compensation to the Service Provider needs to provide them with a *reasonable return*.

Public sector aspects to be brought in here.

Contract needs to be long enough to allow private sectors to want to participate in PPP; but also important for public sector to look over how contract is managed/operated so that when and if they take over the project, they will have been able to absorb the aspects that make it work in the first place.

Length of contract should depend on the type of PPP project (see below).

6.11 – Asset Ownership (Public)

As far as possible assets should be transferred into public ownership as soon as possible following construction. Depending on the type of PPP (DBOT may transfer ownership a later time; but many recent PPPs are looking to have the transfer of ownership at an earlier stage)

1. Important to consider local legislation
2. Facilities such as ports may not be able to be held as private sector assets
3. Legally the private sector may not be able to deliver certain services –
 - a. Perhaps some example to show why this is important
 - b. (if legislative environment is not taken into consideration, it might be perceived as a barrier to bidding for the PPP)
 - c. (a PPP service may start and later be proven that it is actually not a service which can be provided by the private sector – health services, for example)
4. Therefore consideration must be given to revising local legislation
5. Risks associated with the physical assets remain with the service provider regardless of ownership

6.12 – Communication and integration of ICT (Information and Communication Technology) processes within the PPP with wider Government ICT. (Trade-Facilitation-Infrastructure projects that have ICT aspects; these aspects need to be considered early on. [private partner not necessarily an ICT expert; the ICT system may perhaps not be compatible with public systems; etc.])
The following need to be addressed

1. Who will own the ICT.
2. Who will own the licences (government)
3. can the ownership of the licences be transferred (should be yes)
4. Who will own the data (should be Government)
5. How will the data be transferred

7.3 Governance

Paloma BERNAL (good governance)

TO BE ADDED

EXPERTS COMMENTS

1) COMMENTS FROM ANNE BELMONTE

Dear Paloma and Maurice,

thank you for the preliminary draft and for your kind request of comments.

The definition of PPP in TF is very well-structured and in-depth. However, we can analyze during the conference if it could be suitable to include in the recommendation a short definition of other forms of cooperation which do not correspond to a proper case of PPP (for instance, without the transfer of risks to the private sector -1.1.b), as the case study that will be developed by the italian experts about the ITH-Italia.

Thank you for mentioning my name in the paragraph 2.05 “Risk of PPP Model”. About that, I suggest to change the title with the following: “National and international principles related to PPP model”.
The content of the article could be developed starting by this provision:

“Each Country providing dispositions concerning PPP models has to guarantee the respect of the principles of national, european and international law concerning:

- public contracts;
- anti-corruption law, transparency measures, law against conflict of interest;
- taxation;
- competition and public subsidies”.

I confirm my participation to the next conference of Tuesday.

Best regards

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Anna Belmonte

2) COMMENTS FROM Lauri Railas

Dear Paloma,

Please find below a few comments on the draft.

Recommendation 14 is about authentication of trade documents. This must carry some other number..

UNECE founded a Working Party on Facilitation of International Trade (WP 4.1) in 1961 to "facilitate international trade and transport by promoting rationalisation of trade procedures and the effective use for this purpose of electronic or automatic data processing and transmission" (Terms of Reference of the Facilitation of the International Trade Procedures). Even now over 50 years after that and after WP 4.1 has become UN/CEFACT, this definition is still good.

Should we have something about the law? PPPs are to be established by using procurement procedures to the extent these apply. There is special legislation on concession but other forms need to be established with more creativity. On the other hand equal treatment and non-discrimination must be observed. Trade facilitation relates to many aspects that are forms of exercise of public power, e.g. collecting customs payments. Does the legal framework in the country allow that? What about breaches of contract? What about changing circumstances?

Best regards,

Lauri

7. ICT (Information and Communication Technology) Infrastructure

1. Eg single-window
2. Eg E-procurement systems
3. Eg CCTV/identification cameras/charging cameras

7.02 – Barriers to Trade

1. Incompatible systems – failure of systems to talk to one another – lack of a genuine single window and the time / cost associated with that.
2. User Charges- entry/processing/registration charges set a level that may discriminate against SMEs and local service providers,
3. Charges set by supplier (service provider) rather than controlled and capped by a public authority
4. An unexpected consequence of contractual performance and payment causes the Operator behaving in a way that maximises their revenue that slows down or impedes trade

7.04 – Best practice model

Design, Build, Implementation, Transfer, Operate

- **Design** System to integrate appropriately with related wider government systems. System to reflect local conditions, ie reliable power supply/back up power supply/ robust kit, secure comms (possibly satellite)
- **Build** Supplier to recommend and supply kit to Authority. Supplier to take risk on compatibility issues regarding the recommended kit.
- **Implementation** Supplier to install all equipment and commission the system.
 - The supplier may have a simple support contract to maintain the ICT
 - or may have a wider brief to provide the full service or part of the service.
- **Transfer** Following build and implementation all hardware and communications equipment to be transferred to the ownership of the authority.

Risk Management

- Ideally the Public Sector should contract separately for the wider service delivery and restrict the “PPP” contract to the technical delivery of the system.
- All hardware, software and communications to be “recommended”, provided and implemented, by the contractor
- The System implementation and operation should be integrated with existing government systems, based on fixed fee for implementation and operation.
- Performance and availability mechanisms should be in place with the opportunity for a supplier to earn back some of the income lost by improved performance etc.

7.05 – Affordability

The system implementation should be self financing from additional revenues generated. If there is a net cost then the system should not be introduced. The Supplier should be paid a pre-agreed fee or set of fees. Any element specifically tied to the generation of additional revenues should be capped to ensure that supplier does not generate super profits by operating the service on behalf of the public sector.

7.06 – User charges

1. Ideally use a unitary charge payable by government and subject to a performance and availability mechanism
2. Transaction charges to the user – these may need to be limited so as not to impede trade and should be set by government and not be linked to the cost of the contract.
3. Otherwise there is state shadow charging,

7.07 – Element of Public Charging (availability and performance)

DELETE

7.08 – Performance Models

Availability of the system – and ability to handle a specific amount of traffic at anyone point. Seems that it would be acceptable risk to the contractor – although this may limit the ability to future proof the technology (for example if trade doubles beyond expected growth over the contract period)... although in that scenario you could define server response times, or some of the other aspects that I've seen with TRIPS (although we can't mention specific software under pain of death!)

7.09 – Value for Money

Again – there may be a dichotomy between affordability and VFM.

7.1 – Contract Length

1. PPP is a poor choice for long term PPP contracts and typically ICT contracts are shorter than Infrastructure projects due to the rapidly changing pace of technology.
2. ICT service providers will not typically take on the risk of technological change after the first “refresh (normally approximately 5 years and certainly no more than 10 years.
3. Typical Contract lengths
 - a. Three to Five years (departmental or local projects)
 - b. Five to Seven years Large (departmental and expensive projects)
 - c. Eight to ten years (large national ICT project)
 - d. Ten to fifteen years (Major very expensive nationally important ICT projects)
4. The smaller the ICT component and the larger the service domain element the more the likelihood is for a five year contract with possible extension

and that trade software would need to be mobile technology for smaller traders – particularly in Africa where mobile technology is more mobile based than in say the UK where there is a greater proliferation of land based internet technology.

7.11 – Asset Ownership (Public)

7.12 – Communication and integration with other ICT

8. Development PPPs

Development PPP are those Public Private Partnerships where Public money (such as USAID) is combined with private monies (from companies, Foundations, NGOs) in a joint fund to achieve a development objective. Typically it may be capacity building, civil society system strengthening, health delivery programmes.

8.01 – Barriers to trade

No Implication Development PPPs should lead to a more transparent environment

8.03 – Best practice model

A development PPP may be used to train Customs and Revenue officials

8.04 – User charges

These programmes are normally free to the recipients . Contracts are let to third parties to deliver the programme on behalf of the Fund Partners. The service delivery may be through training, or through technical support and advice.

8.05 – Performance models

Contracts payment will be made to the service provider. The contract will have a performance mechanism based on the quality of service as assessed by the users and/ or and will be subject to outcomes achieved as a consequence of the service provided. For example increased revenue collection

8.06 – Contract length

These PPP programmes are relatively short from a few months to three to five years(although in the health sector they may be as much as 7 years)

8.07 – Asset Ownership

There are normally no significant assets associated with a development PPP.

8.08 – Communications and integration with ICT

Development PPPs often use computers and related software. A key issue is to ensure that any such training would be undertaken on appropriate platforms.

9. Hybrid / Blending / Triangular PPPs

1. PPPs where there is not going to be an attractive enough return for the private sector, yet this particular piece of infrastructure is seen as a vital economic growth enabler?
2. These are PPP projects where there is a mix of private sector delivery and donor funding. The objectives of the Donor(NGO) and the service deliver are likely to be complementary.
3. Is the provision of an effective dry port in a particular location. However the private sector is seeking a commercial return whilst the donor might not be. In which case they would follow the standard model for a PPP.
4. The donor/NGO or Foundation may be guaranteeing a loan which will result in the cost of the loan falling or a loan being made in the first instance. ,
5. Only the private sector is only financing a proportion of it, therefore they need to recover less costs – and thus the contract is more affordable.

9.02 – Typical Characteristics

An NGO or foundation provides third party financial backing to make a PPP affordable. For example a Charity may construct or run part of a facility without any onward charge to the users or government and the financing is all donor based

9.03 – Best Practice Models

9.04 – Surpluses Generated

Suitable profit sharing model to encourage the private sector to push beyond their income ceiling